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No. 88-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT M. ADLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO OPPOSITION OF UNITED STATES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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The United States sought appellate consideration of the issues in this case by the Eleventh Circuit Court of Appeals pursuant to 18 U.S.C. § 3731. Now it urges that the judgment of the court of appeals should be equated with an interlocutory decision of a district court denying a motion to dismiss an indictment, which may be mooted by a defendant's acquittal at trial or consolidated with all other issues on appeal from a final judgment. (United States Opp. 3-4).

The approach of the United States is flawed in the following respects.

First, general principles concerning appellate review of interlocutory orders of district courts are not pertinent. Petitioner seeks review of the judgment of the court of appeals, not an interlocutory order of a district court. That court of appeals' judgment accompanies a published opinion which is binding precedent in the Eleventh Circuit and which establishes a present and persistent conflict with the decision of the Fourth Circuit in *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985), and the decision of the Fifth Circuit in *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc). Neither the precedential value of the court of appeals' decision in this case nor the split it creates within the circuits can be mooted by any later development in the district court.

Bank of Nova Scotia v. United States, 108 S. Ct. 2369 (1988), is directly relevant. In *Bank of Nova Scotia*, the district court dismissed an indictment as to the Bank of Nova Scotia before trial. Upon an appeal by the United States pursuant to 18 U.S.C. § 3731, as in this case, the court of appeals held in favor of the United States and reversed, reinstating the indictment and remanding for trial. *United States v. Kilpatrick*, 821 F.2d 1456, 1475 (10th Cir. 1987). This Court granted the writ of certiorari to review the judgment of the court of appeals, notwithstanding the possibility that trial would moot the claims of the Bank of Nova Scotia. *See Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494 (1989) (certiorari granted to review court of appeals' dismissal of interlocutory appeal of denial of motion to dismiss and remand for a trial that could have mooted appellate issue in event of acquittal); *cf. Michael v. United States*, 454 U.S. 950, 951-52 (1981) (White, J., dissenting from denial of certiorari to review court of appeals' judgment reversing suppression of evidence). Petitioner herein

is no less entitled to certiorari review by the possibility of later acquittal than were the petitioners in *Bank of Nova Scotia*.

Second, petitioner requests certiorari to determine whether a defendant in his circumstances is entitled to a judicial determination, before trial, of controlling legal issues which require dismissal of the indictment. Inherent in the questions presented for review, therefore, is the right to a pretrial ruling dismissing an indictment. If review of those questions is delayed until after a trial, no further review can grant this petitioner the right not to be placed in jeopardy. *See Abney v. United States*, 431 U.S. 651 (1977).

Third, this Court grants certiorari to review interlocutory judgments where the issue involved is "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *see also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947). Petitioner's contention that this prosecution is controlled by legal principles to be decided by a court, not a jury, plainly is fundamental to the further conduct of the case. It is fundamental in a way that a contention concerning the suppression of certain evidence would not be. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (certiorari review of court of appeals' denial of mandamus to compel district court to try case to a jury and not to the court alone).

Finally, the importance of the questions presented make them worthy of review at this time. *See Estelle v. Gamble*, 429 U.S. 97 (1976) (certiorari review of court of appeals' reversal of dismissal of complaint). Tax lawyers must counsel with clients every day concerning unclear legal questions. If the legal advice has a reasonable basis or the law is unclear, a lawyer would not heretofore have expected to be subjected

to criminal prosecution. Courts permit experts to debate their opinions on many issues, but our system traditionally has recognized that judges tell the jury what the law is. If juries will decide questions of tax law, and if criminal liability can be asserted as to advice on unclear and debatable legal issues, conscientious representation by tax lawyers of their clients will be chilled. It will not matter what a jury decides concerning petitioner's opinion in this case; the decision of the court of appeals will place tax lawyers at risk of being right or going to jail.

Respectfully submitted,

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